STATE OF MICHIGAN

COURT OF APPEALS

MARCEL D. P. BURGLER, Plaintiff-Appellant,	UNPUBLISHED May 10, 2012
v	No. 304073 Kent Circuit Court
CATHERINE M. SNOW, Defendant-Appellee.	LC No. 09-000952-DM

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment of divorce. For the reasons stated in this opinion, we affirm in part, vacate in part, and remand for further proceedings.

This appeal concerns the valuation of two of the parties' commercial real estate properties, Studio One and Greenville, as well as the trial court's determination of the parties' incomes. The parties were married in 1985. Plaintiff filed a complaint for divorce against defendant on January 28, 2009.

At the beginning of their marriage, the parties opened Burgler Advertising. Defendant worked full-time at Herman Miller while the advertising agency was "getting off the ground," and in 1988, she stopped working to be a full-time mother when their first son was born. The parties have three other children. During the marriage, defendant worked "on and off" part-time as a copywriter at the advertising agency. The advertising business eventually grew to the point that it had 25 employees.

In 1993, plaintiff sold the advertising agency to pursue a career in commercial real estate. Plaintiff bought into Prime Development and worked as a real estate developer and independent broker in commercial real estate. Defendant continued to work part-time for the advertising agency's new owner so that the parties could have health insurance. Since 1995, defendant engaged in part-time freelance work.

During the trial both parties testified in regard to their income and income-earning ability. Additionally, both plaintiff and defendant had an expert certified public accountant testify in regard to the value of the commercial properties and plaintiff's income. The parties disagreed regarding income and the value of the properties. Plaintiff asked the trial court to use $36,000 as his income, but admitted that the figure "was really just picked out of the air." Defendant asked

the trial court to use $165,000 as plaintiff's income. Plaintiff asked the trial court to use $20,000 for defendant's income, again acknowledging that it was a "made-up number." Defendant maintained that her income should be zero. In regard to the Studio One and Greenville properties, defendant maintained that they should be valued at zero. Plaintiff argued that Studio One should be given a value of negative $1,965,915, and that Greenville should be given a value of negative $378,406.

On March 17, 2011, the trial court issued its opinion and order, and on May 2, 2011, the trial court entered the judgment of divorce, which awarded defendant the marital home and cottage as well as her business and the property at which the business was located, and which awarded plaintiff all of the other commercial real estate, including the Greenville and Studio One properties. The trial court valued both the Greenville and Studio One properties at zero. Further, the trial court considered defendant's income to be zero, and plaintiff's income to be $100,073 for purposes of calculating child support and spousal support.

Plaintiff now appeals, and challenges the trial court's valuation of the Greenville and Studio One commercial real estate properties, its methodology for equalizing the division of the marital estate, and its determinations of each party's income for purposes of awarding child support and spousal support.

I. PROPERTY VALUATION

Plaintiff first argues that the trial court erred in placing a zero value on the Greenville and Studio One properties.

We review a property distribution in a divorce case by first reviewing the trial court's factual findings for clear error. *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). A finding is clearly erroneous if, after reviewing all the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Johnson v Johnson*, 276 Mich App 1, 10-11; 739 NW2d 877 (2007). This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses. *Id*. at 11.

Plaintiff asked the trial court to value the Greenville property at negative $378,406, and to value the Studio One property at negative $1,965,915. Defendant asked the court to value both properties at zero. "In cases where marital assets are valued between divergent estimates given by expert witnesses, the trial court has great latitude in arriving at a final figure." *Stoudemire v Stoudemire*, 248 Mich App 325, 338-339; 639 NW2d 274 (2001).

With respect to the Studio One property, plaintiff testified that the market value of the building was $12,700,000 and that the mortgage debt was $21,056,060, which resulted in a net market value of his percentage interest of $1,965,915. With respect to the Greenville property, plaintiff testified that the market value of the building was $510,000 and that the mortgage debt was $1,272,237, resulting in a net market value of his percentage interest of negative $378,406. Plaintiff's valuations were based on appraisals (which took into account financials) that were conducted before forbearance agreements were entered into on those properties. According to defendant's expert, the forbearance agreements for those properties constituted a renegotiation of

the loans, which was essentially "a market transaction that valued both of those properties at zero."

Plaintiff's negative valuations were based on expert appraisals that used a capitalization rate of 10 percent. For the Studio One property, despite a range of capitalization rates (6.86 to 9.11) listed in the appraisal, the capitalization rate actually used by the appraiser was 10 percent. For the Greenville property, the capitalization rate used by the appraisers was also 10 percent. Plaintiff explained that "the lower the cap[italization] rate the higher the value assigned to the property." Thus, the higher the capitalization rate, the lower the value assigned to the property. Plaintiff's incentive to employ a higher capitalization rate of 10 percent in valuing those properties is evident. The lower the value of the properties, the more the trial court would have to award him from the marital estate to make the property division equitable.

In determining the values of the parties' commercial real estate properties, the trial court found it significant that plaintiff had requested an award of all of the parties' unsold commercial properties. The trial court noted that lower values for those assets inured to plaintiff's benefit in his proposed property distribution and stated that "[w]hether [p]laintiff's selection of cap[italization] rates for reaching his opined value of the commercial properties was consciously manipulative, or merely unreliable, it is clear that the [c]ourt should not be bound by his opinions in this regard."

We give special deference to the trial court's finding that plaintiff's valuations were suspect. *Johnson*, 276 Mich App at 10-11. A review of the record reveals that the trial court did not clearly err in valuing the Greenville and Studio One properties at zero. Those valuations are supported by the testimony of defendant's expert, which the trial court found more credible than the negative valuations arrived at by plaintiff and his appraisers. Accordingly, we conclude that the trial court did not clearly err in valuing the Greenville and Studio One properties at zero.

II. PROPERTY DIVISION

Plaintiff next argues that the trial court's property distribution was inequitable.

We review a property distribution in a divorce case by determining whether a dispositional ruling was fair and equitable in light of the facts. *Olson*, 256 Mich App at 622. Property disposition rulings will be affirmed unless we are left with the firm conviction that the distribution was inequitable. *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995).

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). "The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained." *Id*. at 717.

Here, the parties owned nine commercial real estate properties. Plaintiff and defendant were each awarded one-half of the proceeds from the sales of two of the commercial properties. The trial court awarded plaintiff six of the remaining seven properties (including Greenville and Studio One, which were valued at zero), and awarded defendant one of the seven remaining

properties (where her business was located). The trial court also awarded defendant the marital home, a cottage, and her business. In addition, the trial court awarded each party one-half of their investments (less an adjustment for the value of plaintiff's vehicle and a deficit in assets awarded to defendant). The real property distribution resulted in $532,297 to plaintiff and $455,757 to defendant. The trial court then equalized the $76,540 difference by instructing the parties to equally divide the investments after adjusting for the value of plaintiff's vehicle ($23,715) and the deficit in the assets awarded to defendant. The trial court's property distribution was nearly mathematically equal, and thus congruent.

Plaintiff argues on appeal that the trial court should have taken the difference of $76,540 and moved half of that amount (or $38,270) to defendant's column. However, this is precisely what the trial court intended and instructed the parties to do. The court explained, "[Defendant] doesn't get a [$]76,540 swing; she gets a $38,270 swing. So it adds up evenly[.]"

Plaintiff also argues that the property distribution does not take into account his proposed negative values of the Greenville and Studio One properties. However, as explained previously, the trial court did not clearly err in accepting defendant's proposed valuations of the Greenville and Studio One properties at zero, and in rejecting plaintiff's proposed negative values of those properties. Accordingly, we conclude that the trial court's property distribution is fair and equitable in light of the facts. *Olson*, 256 Mich App at 622.

III. DETERMINATION OF INCOME

Plaintiff next argues that the trial court clearly erred in determining his income and defendant's income for purposes of calculating child support and spousal support.

"[F]actual findings of a trial court in a divorce case are to be reviewed for clear error. A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been committed." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). "[I]f the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Id*.

With regard to child support, "when a court orders child support as part of a divorce judgment, 'the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau' unless to do so would be 'unjust or inappropriate' and the trial court makes certain specified findings 'in writing or on the record[.]'" *Stallworth v Stallworth*, 275 Mich App 282, 283-284; 738 NW2d 264 (2007), quoting MCL 552.605(2). "Thus, a trial court must presumptively follow the Michigan Child Support Formula (MCSF). If the court deviates, it must make an adequate record regarding the mandatory statutory criteria for doing so." *Id*. at 284.

"The first step in figuring each parent's support obligation is to determine both parents' individual incomes." 2008 MCSF 2. "In general, this is determined by ascertaining 'the actual resources of each parent.'" *Stallworth*, 275 Mich App at 284, quoting MCL 552.519(3)(a)(*vi*). "The term 'net income' means all income minus the deductions and adjustments permitted by [the MCSF] manual." MCSF 2.01(A). "A parent's 'net income' used to calculate support will not be the same as that person's take home pay, net taxable income, or similar terms that

describe income for other purposes." MCSF 2.01(A). "The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support." MCSF 2.01(B). Income includes "[e]arnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals" and "other monies . . . as a result of any employment." MCSF 2.01(C)(1); MCSF 2.01(C)(2).

The MCSF instructs trial courts to "not consider expenses consistent with a parent's business or occupation as part of a parent's income." MCSF 2.01(E). "Unless otherwise counted a parent's income includes the following expenses if they are inconsistent with the nature of the parent's business or occupation:" rent paid by the business to the parent; depreciation allowances; home office expenses; entertainment expenses; travel expense reimbursements; and personal automobile repair and maintenance expenses. MCSF 2.01(E). "Where income varies considerably year-to-year due to the nature of the parent's work, use three years' information to determine that parent's income." MCSF 2.02(B).

"When a parent is voluntarily unemployed or underemployed, or has an unexercised ability to earn, income includes the potential income that parent could earn, subject to that parent's actual ability." MCSF 2.01(G). "The amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income." MCSF 2.01(G)(1). The trial court should "[u]se relevant factors both to determine whether the parent in question has an actual ability to earn and a reasonable likelihood of earning the potential income." MCSF 2.01(G)(2). "To figure the amount of potential income that parent could earn, [the trial court should] consider the following: (a) [p]rior employment experience and history, including reasons for any termination or changes in employment[;] (b) [e]ducational level and any special skills or training[;] (c) [p]hysical and mental disabilities that may affect a parent's ability to obtain or maintain gainful employment[;] (d) [a]vailability for work . . . [;] (e) [a]vailability of opportunities to work in the local geographical area[;] (f) [t]he prevailing wage rates in the local geographical area[;] (g) [d]iligence exercised in seeking appropriate employment[;] (h) [e]vidence that the parent in question is able to earn the imputed income[;] (i) [p]ersonal history, including present marital status and present means of support[;] (j) [t]he presence of the parties' children in the parent's home and its impact on that parent's earnings[;] [and] (k) [w]hether there has been a significant reduction in income compared to the period that preceded the filing of the initial complaint[.]" MCSF 2.01(G)(2).

With regard to spousal support, the primary objective is "to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Spousal support is to be based on what is just and reasonable under the circumstances of the case. *Id*. Relevant factors for the court to consider include the length of the marriage, the ability of the parties to pay, the past relations and conduct of the parties, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996).

Regarding plaintiff's income, the trial court found that he received payments, cash distributions, fees, and commissions through his real estate work. The trial court also took into account plaintiff's need to have working capital on hand should cash calls arise, but noted that

plaintiff may be repaid such monies and that the creation of forbearance agreements for the Greenville and Studio One properties were expected to substantially reduce the demands for cash calls.

The net income arrived at by the trial court for plaintiff considered "[a]ll relevant aspects" of his financial status. MCSF 2.01(B). This enabled the court to establish, as accurately as possible, how much money plaintiff should have available for support. MCSF 2.01(B). In determining plaintiff's income, the court included earnings generated from plaintiff's real estate business. MCSF 2.01(C)(2). The court also took into consideration expenses consistent with plaintiff's business and occupation, i.e., cash calls, when determining plaintiff's income. MCSF 2.01(E). Plaintiff argues that the trial court should have considered business expenses including "office rent, office telephone, [r]ealtor dues, automobile expenses, [r]ealtor subscriptions, costs for real estate signs, and postage" in calculating his income. However, the record does not reflect that the trial court added any deductions from plaintiff's tax return to his income when determining his child support obligation. Because plaintiff's income varied considerably from year to year due to the nature of his work, the trial court used three years of information (from 2008, 2009, and 2010) to determine his income. MCSF 2.02(B). After consideration of all the evidence and factors, the trial court rejected plaintiff's proposed income figure of $36,000 and also rejected defendant's proposed income figure of $165,000, to arrive at an income figure of $100,073 for purposes of calculating child support and spousal support. This figure fell squarely within the range established by the proofs. We conclude that the trial court's factual findings concerning plaintiff's income are supported by record evidence and, therefore, are not clearly erroneous. *Beason*, 435 Mich at 805.

With respect to defendant's income, the trial court found that she had not earned any significant income since the births and adoption of the parties' children and accordingly assigned defendant an income of zero. The trial court noted that the parties had a traditional marriage in which plaintiff was the primary income earner and defendant took care of the children, and that defendant's efforts to develop work in her former areas of employment had been unsuccessful. The trial court also found that while both parties had the ability to work, defendant's homemaker role placed her at a distinct disadvantage, and that she would not be in a position to obtain employment that would afford her the opportunity for career advancement before retirement.

We conclude that the trial court clearly erred when it determined that defendant's income was zero. First, the trial court's determination that defendant had not earned any significant income since the births and adoption of the parties' children is not supported by the record. Defendant herself testified that she worked part time at the advertising agency until 1995 when she started doing part-time freelance work. While defendant and plaintiff both testified that they had a traditional marriage and defendant's primary role was that of homemaker, it was not disputed that defendant earned some income from her part-time work. Specifically, defendant did not dispute plaintiff's claim that she was able to earn as much as $40,000 a year working part time. Accordingly, it was clearly erroneous for the trial court to conclude that defendant did not earn any significant income during the marriage.

Further, the evidence demonstrated that at the time of the trial, defendant had a business that she operated. Accordingly, defendant had the potential to earn income through this business. Further, defendant testified that she had already earned about $4,000 in 2010.

Defendant also testified that she had a lead on a potential job at which she would earn $20,000 to $30,000 a year and receive benefits. Accordingly, the trial court clearly erred when it declined to impute any income to defendant because the evidence clearly demonstrated that defendant had "an actual ability to earn and a reasonable likelihood of earning" at least some income. MCSF 2.01(G)(2). Accordingly, we remand to the trial court for reconsideration of defendant's income in light of her testimony that she already earned $4,000 that year at the time of the trial, and the evidence of her ability earn income in the past.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra